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No. 338

Supreme Court of the United States

MAX KUT,

Appellant,

v.

ALBERS SUPER MARKETS, INC., B. MANISCHEWITZ CO., BLUE BIRD PIE CO., GEORGE WIEDEMANN BREWING CO., INC.,

Defendants,

and

BUREAU OF UNEMPLOYMENT COMPENSATION OF THE STATE OF OHIO, AND BOARD OF REVIEW THEREOF,

Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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By stipulation of counsel for the parties, filed in the Supreme Court of Ohio, the record omitted the proceedings before the Bureau of Unemployment Compensation, "it being agreed that the opinion and judgment of the Common Pleas Court and the opinion and judgment of the Court of Appeals *correctly and sufficiently present the facts* necessary to be considered by the court".

The facts, as set forth in said opinions and judgments, are that appellant was employed in June, 1943, as an order

clerk by Albers Super Markets, Inc., with the understanding that he would be advanced to a higher job within a reasonable time; that he is an orthodox Jew who has always followed the traditional tenets of his religious faith, one of which precludes him from working from sundown Friday evening to sundown Saturday evening, this period being his Sabbath; that while so employed, he had arranged to be off on his Sabbath and in lieu thereof worked Sunday afternoon and evening; that in all his prior employments he had never worked on his traditional Sabbath, but was available for work at all other times of the week, both day and night; that because of meritorious service for his employer he was given a promotion as a "checker," but without receiving the pay of a regular checker; that after receiving repeated promises that he would receive the wages of a regular checker, he was finally put on the payroll at a higher rate; that the union objected on the ground that he was being promoted in advance of other employees who had acquired more seniority; that since the only work that his employer had to offer was to demote him to an order clerk, at which job he had started, the employer assumed that this would not be satisfactory to him and gave him his release, thus terminating his employment on March 7, 1944; that appellant voluntarily quit his work "for just cause" and did not secure other employment until April 4, 1944; that between March 7 and April 4, two opportunities arose whereby he was offered employment which required work on his Sabbath, which opportunities he declined; and that on April 4, 1944 he obtained employment which permitted him to be absent from work on his Sabbath.

In appellees' motion to dismiss or affirm, four reasons are advanced in support of such motion. We shall consider briefly each of these in turn.

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I.

Although appellees assert that the record does not show that the federal question was reserved by the appellant in the state courts, the record shows, beyond dispute, that the federal question was raised and argued initially before the referee who heard the appeal from the decision of the Administrator disallowing appellant's claim, and thereafter before the Board of Review, the Common Pleas Court, the Court of Appeals and the Supreme Court of Ohio. See paragraphs 5 to 9, both inclusive, of appellant's "Jurisdictional Statement" where specific references to the repeated raising and consideration of the federal question are set forth.

II.

The decision of the Supreme Court of Ohio does not rest upon a tenable non-federal ground. Although the Supreme Court stated in its opinion that appellant had voluntarily quit his employment, "thus making himself unavailable for work—a direct violation of the statute which was not designed for the purpose of protection against unemployment that is voluntary" (146 O. S. 522, 526), such finding is directly contrary to the undisputed facts and has no support in the record. As already set forth herein, counsel for the parties stipulated in writing, in connection with the preparation of the record for the Supreme Court of Ohio, that the opinions and judgments of the Common Pleas Court of Hamilton County, Ohio, and of the Court of Appeals for the First Appellate District of Ohio, correctly and sufficiently presented the facts. The Common Pleas Court found that appellant voluntarily quit his work at Albers Super Markets, Inc., on March 7, 1944 "*for just cause.*" The Court of Appeals found that the employer assumed that appellant's demotion "would not be satisfactory to Kut and gave him his release, thus terminating his employment on March 7, 1944."

Such a stipulation, either as to facts or as to the contents of the record, is binding upon the parties thereto. *Ish* v. *Crane*, 13 O. S. 574 (1862); *Garrett* v. *Hanshue, et al.*, 53 O. S. 482 (1895); *In re Estate of Henry A. Monfort*, 193 Minn. 594 (1935); 50 *Am. Jur.* 610, Sec. 9. Nor can this doctrine be avoided by calling the stipulation an abstract of the record. 4 *C. J. S.* 1479, Sec. 989a.

A court is not warranted in going beyond the record as so stipulated. See *Home for Incurables* v. *City of New York*, 187 U. S. 155 (1902); *Louden Machinery Co.* v. *Day*, 105 Vt. 520 (1932); *Shoener* v. *Schuylkill County*, 107 Pa. Super. 114 (1932); 4 *C. J. S.* 1479, Sections 989, 998 and 1005.

Moreover, no issue was made by appellees in any of the courts below that appellant had not terminated his employment for just cause. (See Jurisdictional Statement, paragraph 9.) As Judge Williams of the Supreme Court of Ohio aptly held in his concurring opinion in *Central Trust Company* v. *Watt*, 139 O. S. 50 (1941) at p. 70:

> "After all, what power has this court on review to determine an issue not made in the lower courts?"

See also *Carney* v. *Dayton Power, Etc. Co.*, 67 N. E. (2d) 122, 124, — O. A. — (1946); *Peoples Savings Bank, etc.* v. *Foureman*, 67 N. E. (2d) 97, 98, — O. A. — (1946). The official citation to these two cases is not available at this time.

Even if it were permissible for the Supreme Court of Ohio to go outside the stipulated record before it with a view to attempting to establish that appellant voluntarily quit his work without just cause, still he would have been entitled to compensation under the Ohio Unemployment Compensation statute then in effect (G. C. Sec. 1345-6, as amended in 120 O. L., pp. 666, 682). Under that statute,

individuals who quit their work without just cause merely had a longer waiting period than those who quit for just cause.

Although counsel for appellees now contend that the only question before the Board of Review or any of the Ohio courts was whether appellant was entitled to benefits, this was not appellees' position prior to the filing of the motion to dismiss or affirm. On the contrary, in the brief of appellees before the Supreme Court of Ohio (page 12) it is stated:

> "The sole question, then, is whether he had a right to refuse the offer of work on the ground that he would not work on Saturdays because of his religion."

That is the substantial constitutional question that was involved throughout all of the prior proceedings; it remains the substantial federal constitutional question on appellant's appeal to this Court.

III.

It is urged that this Court is bound by the interpretation of the Supreme Court of Ohio on state statutes aside from any federal question. We have no quarrel with this statement as a general proposition, but it has no application to this appeal because, as herein shown, the federal question was raised and considered at every stage of the proceeding; the federal question is substantial and remains the same under the statute as interpreted by the Supreme Court of Ohio and under the statute as interpreted by the Administrator of the Bureau of Unemployment Compensation, and a review by the Supreme Court of the United States of this substantial federal question involved cannot be prevented by the Supreme Court of Ohio basing its decision in part on a non-federal ground that is unsubstantial and illusory.

IV.

That the Supreme Court of Ohio thought that a constitutional question was involved is evidenced by the fact that that court, after appellant appealed as of right on constitutional grounds, overruled appellees' motion to dismiss such appeal as of right. Under the decision of the Supreme Court of Ohio, the only way appellant is free to observe his Sabbath is by foregoing all rights to unemployment benefits, notwithstanding his employers, who are required by the taxing power to pay into the fund for such benefits, had employed him knowing that he was unavailable for work on his Sabbath. Not only does this constitute a tax levied for the benefit of adherents of certain religions exclusively, but appellant may enjoy his religious right of not working on his Sabbath only by necessarily foregoing an economic right in the form of unemployment compensation benefits. The state statute, as interpreted by the Supreme Court of Ohio, would, in practical operation, interfere with freedom of religion and would discriminate against those individuals who have religious scruples about performing gainful labor on their Sabbath. This is contrary to the principles established in *Minersville District* v. *Gobitis*, 310 U. S. 586 (1940); *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), and *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

We urge, therefore, that appellees' motion to dismiss or affirm be overruled and that probable jurisdiction be noted on this appeal.

Respectfully submitted,

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